COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term

No. 71-1020

HERBERT W. CABBLER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the trial court, i.e., defendant and Commonwealth.

REFERENCE TO REPORT OF OPINION

The decision and opinion of the Supreme Court of Virginia, from which the appeal is taken, has now been reported as *Cabbler* v. *Commonwealth*, 212 Va. 529 (1971).

STATEMENT OF THE CASE

The Commonwealth hereby adopts the Statement of the Case and Questions Presented as set out in the defendant's brief.

STATEMENT OF FACTS

The following statement of facts is set out, not necessarily to correct erroneous statements of the defendant, but merely to clarify and amplify the factual situation arising from a lengthy trial.

On the early morning of September 2, 1969, Roanoke police officers were looking for the defendant because they knew that the victim of an alleged felonious shooting into an occupied building was on his way to swear out a warrant for him. The defendant's car was spotted in downtown Roanoke and was followed to the emergency room of the Community Hospital of Roanoke Valley, where the defendant parked it in a "no parking" zone and in a position which partially blocked the entranceway for emergency vehicles at the hospital's emergency room, all of which area is private property in which parking and traffic regulations are made by the hospital management.

The defendant and a passenger in the car alighted and went into the emergency room. Police Sergeant R. C. Reynolds observed a pistol and boxes of ammunition in the back seat and back floorboard of the car and stationed a police officer to guard the car while he, Sgt. Reynolds, went inside the hospital. Sgt. Reynolds called the warrant issuing magistrate on duty and determined that a felony warrant had been issued for the defendant. He then proceeded to arrest the defendant in the hospital emergency room where the passenger was undergoing medical treatment.

It was starting to rain as the defendant and Sgt. Reynolds left the emergency room, and the defendant asked Sgt. Reynolds to roll up his car window, indicating the 1967 Cadillac in which the pistol and ammunition had already been seen. The car keys were removed from the defendant's pocket and then Sgt. Reynolds took him to his police car to wait while the car windows were rolled up.

Sgt. Reynolds went to the defendant's car, closed the windows, removed the pistol and ammunition and stationed another officer to guard the car until he returned. Sgt. Reynolds advised the defendant that his car would be taken to the City Garage and stored there for him until he was able to post bond on the felony charge for which he was being arrested. He then drove the defendant to the Municipal Building to be "booked" and turned him over to the other officers. Sgt. Reynolds was driven back to the Community Hospital where he got in the Cadillac and drove it to police headquarters.

While parked outside the west door of the Municipal Building Sgt. Reynolds opened the trunk of the car with the keys he had taken from the defendant. His intention at that time was not to search for evidence of any crime, but to remove any personal valuables from the car and to store them in the Number Two Property Room, located in the main Municipal Building. Upon seeing a large quantity of clothing in the trunk of the car, Sgt. Reynolds quickly concluded that the Number Two Property Room was too small for his purposes, so he drove the car a block away to a point beside the Municipal Building Annex in which the Police Department's larger, principal property room is located.

There Sgt. Reynolds and several other officers systematically removed and tagged for identification the numerous items of clothing, etc., which constituted the contents of

the trunk of the car. All of this property was guarded until the Property Officer arrived later that morning and was then stored in the main Property Room. Some of this property, which was never claimed by the defendant before the initiation of the instant prosecution, turned out to have been stolen and was introduced at the defendant's trial as evidence against him.

Each of the officers who participated in the guarding and inventorying of the defendant's car testified at the hearing on defendant's motion to suppress the evidence found as a result of this inventory. No one testified that the purpose of the inventory was to "search" for evidence of any crime or to perform any function other than finding, identifying and storing the defendant's valuables for safekeeping while he was in custody and while his car was in the possession of the Police Department. None of these officers heard the defendant protest the police officers' taking temporary custody of his vehicle or offer to have the car moved from its hazardous location by any other means.

The evidence was uncontradicted that the inventory of the defendant's car was conducted purportedly to safeguard the defendant's valuables and was also conducted pursuant to long-standing practices of the Roanoke Police Department. Several officers testified as to the circumstances under which it was their practice to take temporary custody of property such as vehicles belonging to arrested individuals; and numerous illustrations were given. The evidence in this regard can be summarized as follows: (1) whenever a person is arrested away from his home under circumstances in which valuable personal property will be left "stranded" as a result of the actions of the police in making the arrest, and no other measures to safeguard the valuables are apparently available, the police will take into temporary pro-

tective custody such items of personal property, including automobiles, and will store them in an appropriate place pending release of the arrested individual from custody. Because of certain unfortunate instances of theft in the past, police officers have been instructed not to surrender custody of automobiles so "impounded" to personnel at the City Garage until an itemized list of the automobile's contents has been made and such contents have been removed and stored for safekeeping in one of the police property rooms. The original taking into custody of the arrested person's property does not turn on whether the property is located on public or private property at the time of the arrest, so long as the fact of the arrest itself would leave the property unprotected if the police were not to assume custody of it.

There was no evidence that the above-stated policies, which had at least once in the past been reduced to writing and promulgated by the Chief of Police, though such written regulations could not be found, had been applied in this or any other case in a discriminatory manner, nor was there evidence that the officers in the instant case were not acting in a good faith effort to execute such policies. Finally, there was no evidence that the arrest of the defendant was any kind of a "sham" or pretext for "searching" his automobile, or that even the initial taking of the car into custody was done upon such pretext, rather than for the stated purposes of (1) eliminating the emergency traffic hazard posed by the car in its location as parked by the defendant, and (2) the protection of the defendant's own property.

ARGUMENT

As pointed out above, in the statement of facts, the taking into custody of the defendant's vehicle was in no way connected with his arrest for a shooting incident, but was done

in order to remove it from obstructing the entrance to the hospital, and to protect it while defendant was in custody. It was done as a matter of standard operating procedure of the police department, and the police had no intention at any time of trying to use the automobile or its contents as a part of any criminal charges against the defendant.

The same applies to the removal of the goods from the trunk of the car and the placing of them in the police property room. At no time during this procedure did the police have any intention other than the protection of the defendant's property, and it was all done pursuant to long-standing police department policy. Having lawfully taken charge of the defendant's automobile, it was incumbent upon the police to ascertain its contents and to store them safely. To protect themselves, as well as the defendant, they reasonably could and should have made an itemized list of all valuable personal property in the car.

In this case there was no "search" in a constitutional sense, because the police were not looking for evidence of any particular crime. It has been recognized by this Court that every physical intrusion into a citizen's property does not imply a "search" of that property, if that is not the intent of the officer making the entry. *Harris* v. *United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). There the investigating officer discovered evidence against the accused while opening the door of his car in order to protect the car from the rain. While the Court held that this was specifically not a case involving the inventory of the contents of a vehicle, it is still an extremely analogous case because it involves evidence obtained while attempting to protect defendant's property, and not as part of any search. The intent in each situation is very important. As said by the Court in the *Harris* case:

". . . the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances."

It is this important element of intent which distinguishes the instant case from the cases of *Preston* v. *United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964) and *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538 (1968). In both of those cases, the officer had seized evidence as a result of an actual search of the automobile, and the officer's motive in each case was to try to find such evidence. In both cases the evidence was held inadmissible because the search was unreasonable in that it could not be upheld as incident to the arrest due to the remoteness of the time and place of the search. The Commonwealth has never asserted in the instant case that the evidence in question was seized as a result of a search incident to an arrest.

Defendant has taken great pains to distinguish the instant case from other similar cases, such as *Harris* v. *United States, supra*; and *Cooper* v. *California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed. 2d 730 (1967), and certainly there are some factual differences. However the reasoning applied by the Court in those two cases, as distinguished from other cases, is the important element, and this reasoning relates to the intent of the persons obtaining the evidence, or the reasons for taking the goods into custody.

Furthermore, it is no answer to say that the police could have obtained a search warrant, for the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. *Cooper* v. *California*, *supra*.

There have been a number of decisions in other states and lower federal courts that have involved substantially

the same situation as the instant case, with varying results, sometimes turning on small factual technicalities. See *People* v. *Norris*, 68 Cal. Rep. 582; *People* v. *Cruz*, 296 N.Y.S. 2d 250; *U.S.* v. *Lipscomb*, 435 F. 2d 795; and *People* v. *Robinson*, 9 Cr L 2218; (evidence admissible); *People* v. *Sullivan*, 292 N.Y.S. 2d 37; *Mayfield* v. *U.S.*, 9 Cr L 2115; *Mozett* v. *Superior Court*, 9 Cr. L 2164; (evidence inadmissible).

In *People* v. *Robinson*, *supra*, the defendant's automobile was impounded after a lawful arrest. The incriminating evidence, a pistol, was found in the trunk in the course of a routine "inventory search" of the vehicle. The testimony at the hearing indicated that the examination of the auto was conducted pursuant to a police regulation, the purpose of which was to inventory and preserve the property in the vehicle, and that in conducting the examination there was no intention to search for evidence of a crime. The court's reasoning in upholding the admissibility of the evidence is closely akin to the position of the Commonwealth in the instant case, therefore, it will be set out at length:

> "Of course, the existence or non-existence of a police regulation cannot be used as a predicate for determining the issue of the reasonableness of an 'inventory search' of a vehicle (cf. *Cooper* v. *California*, 386 U.S. 58, 61) but in deciding the question we should not reach out to stamp as unconstitutional a procedure which bears every indication of reasonableness. The 'search' of a vehicle which has been lawfully impounded for the purpose of inventorying its contents is calculated to safeguard them for the benefit of their rightful owner as well as to protect the police against possible dishonest claims of misappropriation of the vehicle's contents; and there would seem to be no valid reason for extending the constitutional limitation against 'unreasonable' searches to a fact pattern where the 'search' is not made in defiance of constitutional standards to

obtain incriminating evidence but rather in furtherance of a wholly reasonable and legitimate purpose (*People* v. *Andrews*, 6 Cal. App. 3d 428; *Cooper* v. *California*, *supra*; *State* v. *Wallen*, 185 Neb. 44; *People* v. *Marchese*, 275 Cal. App. 2d 1135).

"The facts here support, if they do not compel, a finding that the 'search' of the defendant's vehicle was made solely for the purpose of compiling an inventory of its contents and that it was not, nor was it intended to be, an exploratory search for evidence. The conclusion here enunciated that items of evidence found in searches of vehicles, lawfully in police custody, when such searches are not made for the purpose of seeking evidence of crime, may not be suppressed is becoming the increasingly accepted view.

"Under the circumstances, therefore, and in the absence of any countervailing appellate authority in this state (but see *People* v. *Sullivan*, 57 Misc. 2d 208, affd. 35 A D 2d 690), I hold that the examination of the defendant's vehicle was not a search for contraband or other evidence of crime but a justifiable routine examination to safeguard its contents and to protect the police department against the possibility of fraudulent claims. Truly, therefore it was not a 'search' in the accepted legal sense but an inventory examination reasonably and properly conducted. What was found on such an examination did not violate the defendant's constitutional privilege against unreasonable search and seizure and should therefore not have been suppressed. The order of suppression should be reversed, on the law and the facts, the defendant's motion denied."

CONCLUSION

For the reasons set out herein, it is submitted that no error was committed by the trial court or by the Virginia Supreme Court, and that the decision of the Virginia Supreme Court is in line with prior decisions of this Court. Therefore, the

Commonwealth prays that certiorari not be granted and that the conviction of the defendant be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 23rd day of March, 1972, I mailed three copies of this brief to John H. Kennett, Jr., Esquire, 133 Kirk Avenue, Southwest, Roanoke, Virginia 24011, counsel for petitioner.

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